

Office - Supreme Court, U. S.

FILED

SEP 29 1942

CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 430

COLONIAL OIL COMPANY,

Petitioner,

vs.

AMERICAN OIL COMPANY.

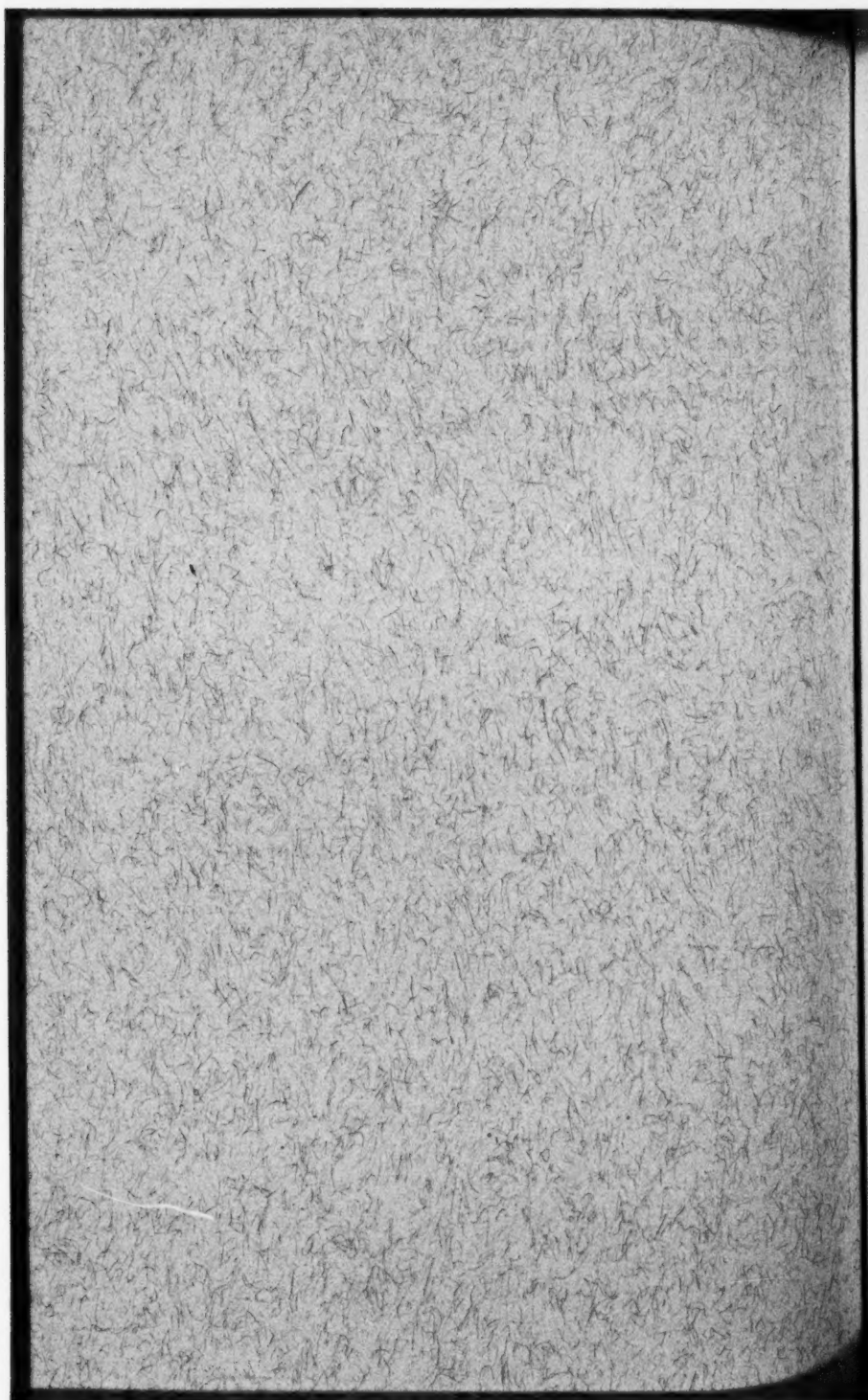
**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT AND SUPPORTING
BRIEF.**

CLAUDE N. SAPP,

HUGH O. HANNA,

THOS. M. BOULWARE,

Counsel for Petitioner.



INDEX.

SUBJECT INDEX.

	Page
Petition for writ of certiorari	1
Summary statement of matter involved	2
Basis of jurisdiction of Supreme Court	4
Questions involved	4
Reasons relied upon for allowance of the writ ..	5
Supporting brief	7
The opinion of the Court of Appeals	7
Grounds on which Supreme Court jurisdiction is invoked	7
Statement of case	7
Specification of assigned errors	9
Argument	9
Specification No. 1	9
Specification No. 2	11

TABLE OF CASES CITED.

<i>McCaughn v. Real Estate Land Title & Trust Co.</i> , 297 U. S. 606	5, 9
<i>Slocum v. New York Life Ins. Co.</i> , 228 U. S. 364	11
<i>The Hartford Life & Annuity Ins. Co. v. Unsell</i> , 144 U. S. 439	5, 9, 11

CONSTITUTION.

Seventh Amendment	6
-------------------------	---

STATUTES.

Judicial Code, Sec. 240-a	4
43 Stat. 936	4
18 Stat. 318, 28 U. S. C. A. 879	5, 9

THE HISTORY OF THE UNITED STATES

OF AMERICA

BY

JOHN F. JOHNSON

THE HISTORY OF THE UNITED STATES OF AMERICA, FROM THE FIRST SETTLEMENTS TO THE PRESENT TIME. BY JOHN F. JOHNSON. VOL. I. NEW YORK: PUBLISHED BY JOHN F. JOHNSON, 10 NASSAU ST. 1854.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 430

COLONIAL OIL COMPANY,

Petitioner,

vs.

AMERICAN OIL COMPANY.

PETITION FOR WRIT OF CERTIORARI.

*To the Honorable the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Your Petitioner, Colonial Oil Company, respectfully represents that it is aggrieved by the final judgment and decision of the United States Circuit Court of Appeals for the Fourth Circuit, in an action at law entitled, No. 4957, American Oil Company, Appellant, *v.* Colonial Oil Company, Appellee, decided August 12, 1942, and by reason thereof your Petitioner prays for the allowance of a writ of certiorari to be directed to the United States Circuit Court of Appeals for the Fourth Circuit, in order that the said judgment and decision may be reviewed by your Honorable Court.

I.

Summary Statement of Matter Involved.

This is an action at law, commenced in the District Court, in which petitioner, as plaintiff, sought actual and punitive damages upon two grounds, (1) trespass to realty, and (2) conversion of personalty. The two grounds are not separately stated but are jumbled together in one complaint. No motion was made by the defendant to require a separate statement of the two causes of action, or to eliminate either issue from the case.

The defendant moved at the close of the testimony for a direction of the verdict on the whole case, and then for a direction of the verdict in its favor as to all punitive damages; but did not make any motion or ask for any peremptory instructions wherein the case for trespass was distinguished from the case for conversion. The District Judge reserved his decision on these two motions, took the matters under advisement, and submitted the case to the jury. It returned a general verdict for \$666.00 actual and \$5,000.00 punitive damages.

The trial was had at the Fall 1941 Term, Orangeburg Division, and thereafter defendant also moved to set aside the verdict and to direct the verdict in its favor in accordance with its motion, and such matter came on to be heard by the Trial Judge on December 17, 1941. No motion for a new trial was made by either party. Counsel for both sides were permitted to file written arguments and after consideration of the same an opinion was filed on March 3, 1942 (43 Fed. Sup. 718), wherein the Judge concluded that such motion should be refused, and a formal order refusing the motion was made March 14th, 1942.

On March 28, 1942, the Judge made another order, reciting that Judgment had been entered on the verdict, November 24, 1941, "although defendant's motion for a

direction of the verdict had not then been finally ruled upon", and ordered that the effective date of the entry of such judgment should be taken to be the date of filing of the order over-ruling defendant's motion, which was March 14, 1942.

Upon appeal by the defendant, American Oil Company, to the Circuit Court of Appeals for the Fourth Circuit, that Court, for the reasons stated in its opinion, entered August 12, 1942, on the same date, reversed the judgment appealed from, and remanded the case for a new trial unless the punitive damages be remitted.

In the said opinion, it is definitely held that the petitioner is entitled to actual damages both as to conversion and trespass, and further the Court did not find error in the District Judge's holding that petitioner is entitled to punitive damages as to the conversion; but the Court of Appeals, *upon* weighing the evidence *pro* and *con* and holding that the respondent was not guilty of wilfulness entitling petitioner to punitive damages in the case for trespass, proceeds to *merge* petitioner's undisputed right to punitive damages for conversion into its other distinct right of action for punitive damages for the trespass, and thereupon reverses the judgment unless the petitioner remits the amount of the punitive damages separately included in the verdict. The reasoning of the Court is given in footnote.¹

¹ "Little need be added in this connection with respect to American's wrongful use of Colonial's equipment. Obviously the gist and burden of the complaint were American's appropriation of the location. Colonial was not interested in the retention of its equipment. On the contrary, it was to its interest to sell the equipment at the Palmetto station, if it had no lease on the premises, as it had done in all of the other stations taken over at the time in conformity with the local practice known to both companies. Colonial's insistence at this time on its rights with respect to the equipment is merely a part and incident of its larger claim as to which no punitive damages are recoverable."

"Our conclusion is that the judgment should not stand since it includes an allowance for punitive damages; * * *"

There may or may not be errors or irregularities in the trial, for which, unless waived by respondent or otherwise rendered harmless, the District Judge would have granted a new trial if respondent had moved therefor; but the only ruling of the District Judge, now reversed, was his refusal to direct the verdict in favor of respondent as to all punitive damages.

There is in the record evidence of wilfulness in the trespass, not discussed by the Court of Appeals, in the form of a statement attributed by petitioner's witness Hanna to respondent's district manager Alridge, when warned over the telephone that action would be brought against respondent if it took possession of this realty, that: "You will have trouble when it comes to the testimony because you don't know that I am Mr. Alridge."

By order of August 29, 1942, the remittitur was stayed for thirty days.

II.

Basis of Jurisdiction of Supreme Court.

Jurisdiction rests upon section 240-a of the Judicial Code, as amended by Act of Congress of February 13, 1925, 43 Stat. 936, conferring jurisdiction to review any judgment of the Circuit Court of Appeals; and section 5-b of Rule 38 of the Supreme Court, together with diversity of citizenship and the jurisdictional amount.

III.

Questions Involved.

1. Does the decision herein reverse the judgment of the District Court for *error in law* on the part of the District Judge so that such reversal is authorized by the Seventh Amendment, when, conceding for the purposes of this question that there is insufficient evidence of wilfulness to war-

rant punitive damages for the trespass to realty, it is held by the District Judge, without reversal, that there is sufficient evidence of wilfulness to warrant punitive damages in the action for conversion of the personalty, and when no separate motion was made for direction of the verdict as to punitive damages for the trespass as distinguished from the conversion, and the reversal is accomplished by merging the distinct right to such damages for conversion into the wholly different right to such damages for trespass—a physical impossibility?

2. Is the decision herein in conflict with *The Hartford Life & Annuity Ins. Co.*, 144 U. S. 439, in that the District Judge is held to have committed *error in law* in not directing the verdict for respondent on the issue of wilfulness in the trespass to the realty when no motion was made for such direction, the only motion made as to punitive damages having included the issue of wilfulness in the conversion, which prevented the granting of that motion?

3. Is the decision herein in violation of Act of Congress, 18 Stat. 318, 28 U. S. C. A. 879, and in conflict with *McCaughn v. Real Estate Land Title & Trust Co.*, 297 U. S. 606, when there is evidence in this case warranting the finding of the District Judge of evidence of wilfulness in the respondent's trespass to the realty, consisting of conflicting testimony and variable reasonable deductions, dependent upon the veracity of the witnesses?

IV.

Reasons Relied Upon for Allowance of the Writ.

The judgment of the Court of Appeals is arrived at in a novel manner, and the petition presents questions concerning right of jury trial and the Seventh Amendment not yet passed upon by the Supreme Court. Holding that there

is no evidence of wilfulness that would warrant punitive damages as to the trespass, and not reversing the District Judge in holding that there is evidence of wilfulness in the conversion of the personalty, and in the absence of any effort of the respondent to obtain a directed verdict as to punitive damages in the trespass alone, the Court of Appeals simply holds that while petitioner refused to sell its personalty to respondent, it would have been to its interest to do so, and therefore, a *non-sequitur*, its insistence upon its rights as to its personalty is merely a part and incident of its claim as to the realty—a holding both novel and incomprehensible, yet effectual in causing a re-examination of a matter once tried by a jury, contrary to the Seventh Amendment.

Unless reversed, the decision will stand as a precedent in the Fourth Circuit, and lead to results in other cases not contemplated by the Seventh Amendment, much confusion and in the end to the necessity of an adjudication by the Supreme Court.

Respectfully submitted,

COLONIAL OIL COMPANY,

By CLAUD N. SAPP,

Its Attorney.

CLAUD N. SAPP,

Columbia, S. C.,

HUGH O. HANNA,

Hampton, S. C.,

THOS. M. BOULWARE,

Barnwell, S. C.,

Counsel for Petitioner.





SUPPORTING BRIEF.

I.

Index to brief is included in index to petition, *supra*.

II.

The Opinion of the Court of Appeals.

This opinion was filed August 12, 1942, but is not yet reported (R. 90).

III.

Grounds On Which Supreme Court Jurisdiction Is Invoked.

This application is made upon authority of section 240-a of the Judicial Code, as amended by the Act of Congress of February 13, 1925, 43 Stat. 936 and section 5-b of Rule 38 of this Court; and upon the ground that petitioner has been deprived of the right of jury trial as guaranteed by the Seventh Amendment.

IV.

Statement of Case.

This is an action for damages based upon two grounds, (1) conversion of personalty and (2) trespass to realty. The grounds are not separately stated, but are jumbled together in one complaint (R. 1 & 25). No motion was made to require a separate statement or to eliminate either issue from the case (R. 25). After all the testimony was in, defendant-respondent moved for the direction of the verdict on the whole case (R. 18) and then for the direction of the verdict as to all punitive damages (R. 20); but did not make any motion or ask any peremptory instructions wherein the case for trespass was distinguished from the

case for conversion. The trial Judge reserved his decision on these two motions (R. 24 & 25) (though the Court of Appeals holds that he then refused the same, the holding being based on matter appearing at R. 20, which is corrected by the trial Judge at R. 25 & 69) and the jury returned a general verdict for actual damages and a general verdict for punitive damages (R. 25). These motions were later fully argued and refused. No motion for a new trial was made by either party (R. 25).

The Court of Appeals definitely holds that petitioner is entitled to actual damages both as to conversion and as to trespass, R-96, and does not find error of law in the trial Judge's holding that petitioner is entitled to punitive damages as to the conversion; but, after weighing the evidence *pro* and *con*, which does exist, holds that the respondent was not guilty of wilfulness entitling petitioner to punitive damages in the case for trespass, and thereupon proceeds to merge petitioner's right to punitive damages for the conversion into its claim for punitive damages for the trespass, holding that its "insistence at this time on its rights with respect to the equipment is merely a part and incident of its larger claim as to which no punitive damages are recoverable", and thereupon holds that the judgment cannot stand since it includes an allowance for punitive damages. R-99.

There is in the record evidence of wilfulness in the trespass, not discussed by the Court of Appeals, in the form of a statement attributed by petitioner's witness H. O. Hanna to respondent's District Manager Alridge, when warned over the telephone that action would be brought against respondent if it took possession of this realty, that: "You will have trouble when it comes to the testimony because you don't know that I am Mr. Alridge." R-88.

V

Specification of Errors.

1. The decision herein reverses the judgment of the District Court in the *absence of error in law* on the part of the District Judge, so that such reversal constitutes a re-examination of facts tried by a jury, other than according to the rules of the common law, in violation of the Seventh Amendment to the Constitution, and in conflict with the procedural requirements outlined by this Court in *The Hartford Life & Annuity Ins. Co. v. Unsell*, 144 U. S. 439; in that, under the rules of the common law and under that decision, a new trial can be granted only for *error in law*.

2. The decision herein is in violation of Act of Congress, 18 Stat. 318, 28 U. S. C. A. 879, providing that there shall be no reversal in a Court of Appeals for any *error of fact*, and in conflict with *McCaughn v. Real Estate Land Title & Trust Co.*, 297 U. S. 606, because there is evidence in this case of wilfulness in respondent's trespass to the realty as held by the District Judge.

VI

ARGUMENT.**Specification No. 1.**

The only ruling of the District Judge as to punitive damages was his refusal to direct the verdict for defendant-respondent, he finding that there was evidence of wilfulness both as to the trespass and as to the conversion, R-75. And no motion or ruling was made in connection with eliminating punitive damages as to the trespass. R-67.

The Court of Appeals holds that there is no evidence of wilfulness as to the trespass, R-98, but does not reverse the District Judge in his holding that there is evidence of wil-

fulness in the conversion, R-99, so that up to this point there is no *error in law* on the part of the District Judge in not directing the verdict as to punitive damages, because there is evidence of wilfulness in the conversion; but the Court of Appeals then, in considering punitive damages as to the conversion, incomprehensibly holds: R-99.

“Colonial’s insistence at this time on its rights with respect to its equipment is merely a part and incident of its larger claim as to which no punitive damages are recoverable.”

and thereupon reverses the judgment and orders a new trial.

However, there is still left in the record the evidence of wilfulness in the conversion, which prevents the Court of Appeals holding without error in law and fact, that the District Judge was in error in law in refusing to direct the verdict as to all punitive damages—unless it can be done by this novel means of merger of petitioner’s rights, or disregard of what is said to be its lesser rights.

Forgetting the distinction between conversion and trespass, the verdict could not be directed as to punitive damages for conversion of a horse and buggy if there is evidence of wilfulness in the conversion of either one. In the instant case, the Court of Appeals correctly holds that the verdict for actual damages \$666.00 seems to have been made up of the value of the equipment, \$465.00, plus an additional sum for damages in the loss of the business of the station, R-91, so that the Court of Appeals is merging the larger into the smaller claim.

The result is that a matter once tried by a jury is being ordered re-examined other than according to the rules of the common law, and also upon reasoning that would convert the Court of Appeals into an arbitrary arbitrator.

The Seventh Amendment provides “ * * * and no fact

tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law;" and those rules did not permit an appellate Court to reverse a judgment at law and order a new trial, *except upon error in law*. *Slocum v. New York Life Ins. Co.*, 228 U. S. 364. And in the *Hartford Life & Annuity Ins. Co.*, 144 U. S. 439, it is held:

"The only ground for serious doubt in the case is, whether the evidence was sufficient in any view of it to sustain the theory. * * * But we need not consider the case in those aspects; for the defendant assumed that it would be submitted to the jury, and asked instructions touching the several points on which it relied. It did not ask a peremptory instruction for a verdict in its behalf. It cannot, therefore, be ground of reversal that the issues of fact were submitted to the jury. As *no error of law* was committed to the prejudice of the defendant, the judgment must be affirmed."

In the instant case, defendant-respondent did not ask a peremptory instruction as to punitive damages for the trespass as distinguished from the conversion.

Specification No. 2.

The District Judge, under the responsibility for the justice of a judgment and with the advantage of studying the witnesses and the evidence as it comes into the record, was of opinion that there is evidence of wilfulness in the trespass, R-75-78; but the Court of Appeals, from its study of the record, finds that there is no such evidence, R-98; that Court, in its search of the record for evidence of an intentional wrong—mental attitude—inadvertently overlooking the testimony of petitioner's witness Hanna, R-88, that when he warned defendant-respondent's District Manager Alridge over the telephone that his company would be

sued if it took this station, Mr. Alridge replied: "You will have trouble when it comes to the testimony because you don't know that I am Mr. Alridge."

And again, the deduction made by the Court of Appeals from all of the evidence that it considered that the investigation made by respondent before taking possession of the realty showed the absence of wilfulness is only one of the possible reasonable deductions therefrom—the other to the contrary being made by an eminent trial judge. And in view of Alridge's testimony above quoted, it is entirely reasonable to say that this investigation was only a search for evidence and not for petitioner's rights.

Respectfully submitted,

CLAUD N. SAPP,
Columbia, S. C.
HUGH O. HANNA,
Hampton, S. C.
THOS. M. BOULWARE,
Barnwell, S. C.
Counsel for Petitioner.



INDEX

PAGE

Jurisdiction	1
Statement	2
Points and Authorities	3
Specification No. 1	4
Specification No. 2	7

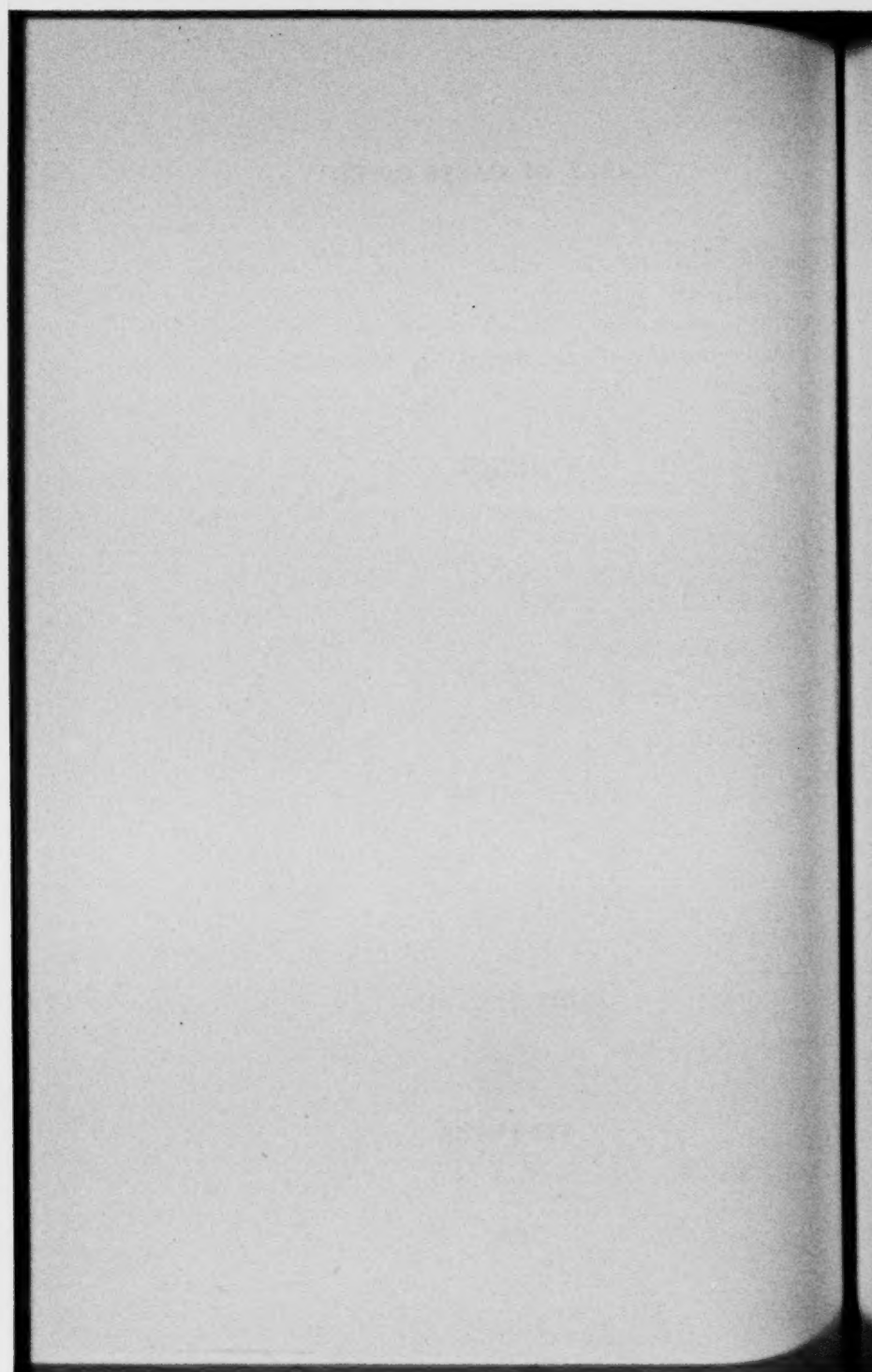


TABLE OF CASES CITED

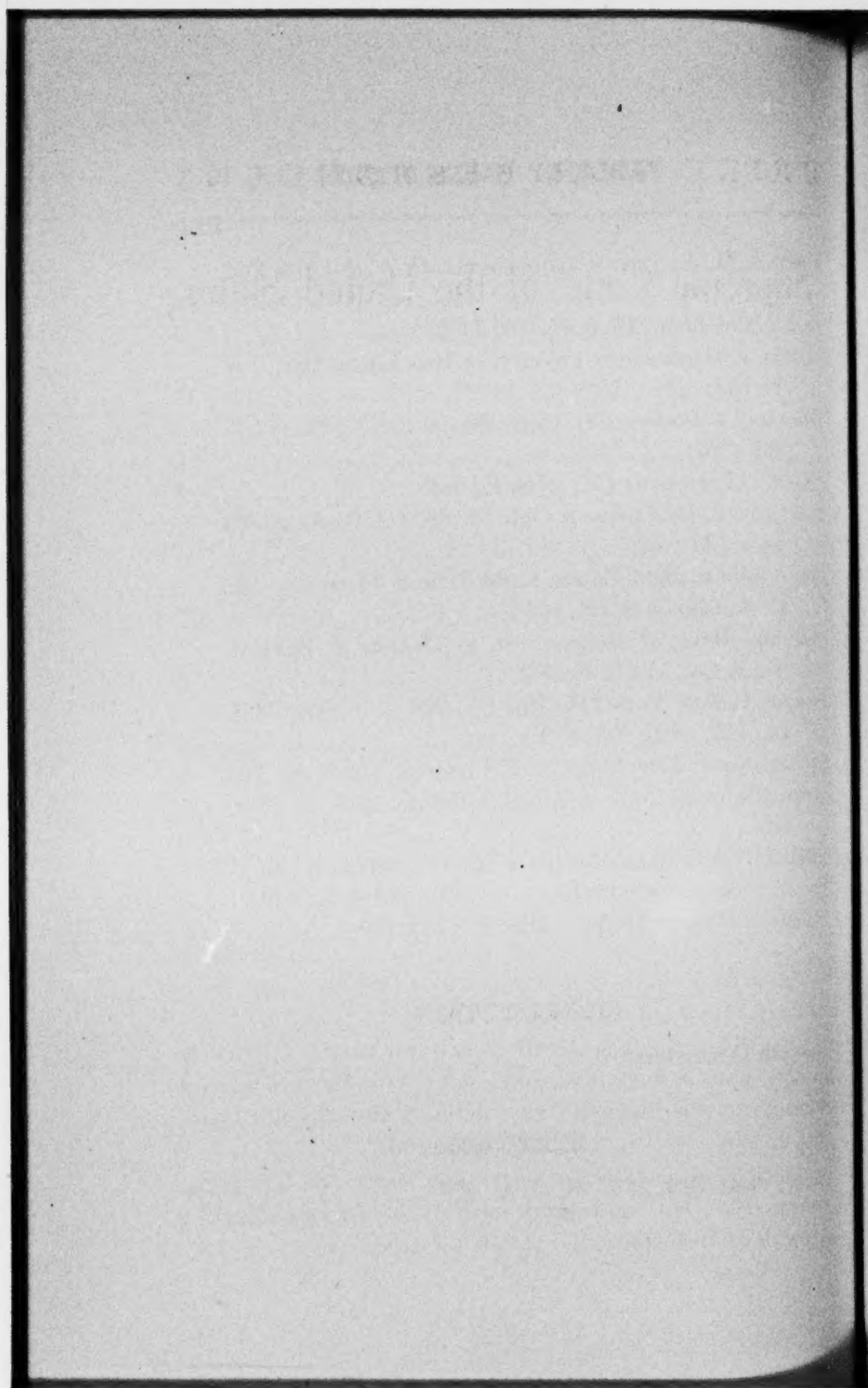
	PAGE
Carroll, M. J., Inc., v. Gilmore (C. C. A., 4), 103 Fed. (2d), 560	6
Cox v. Coleman, 200 S. E., 762 (1938)	5
Eaddy v. Greensboro-Fayetteville Bus Lines, Inc., 5 S. E. (2d), 281 (1939)	5
Gunning v. Cooley, 281 U. S., 90, 50 S. Ct., 231, 74 L. Ed., 720	6
Gwyn v. Telephone Co., 48 S. E., 460	5
Hartman v. Baltimore & Ohio R. Co. (C. C. A., 4), 89 Fed. (2d), 425	6
McCaughn v. Real Estate Land Title & Trust Co., 297 U. S., 606, 56 S. Ct., 604	3, 7
National Bank of Honea Path v. Thomas J. Barrett, Jr., & Co., 174 S. E., 581	6
Sloeum v. New York Life Ins. Co., 228 U. S., 364, 33 S. Ct., 523, 58 L. Ed., 879	6
Snellgrove v. Life Ins. Co. of Virginia, 179 S. E., 793	6
State Highway Dept. v. Amick's Estate, 18 S. E. (2d), 663	6
Turner v. American Motorists Ins. Co., 180 S. E., 55 ..	6
Welch v. Missouri State Life Ins. Co., 180 S. E., 447 ..	6
Young v. Hyman Motors, 19 S. E. (2d), 109	6

CONSTITUTION

Seventh Amendment	3
-------------------------	---

STATUTES

XVIII Stat. 318, 28 U. S. C. A., 879	3, 7
--	------



BRIEF FOR RESPONDENT

Supreme Court of the United States

OCTOBER TERM, 1942

No. 430

COLONIAL OIL COMPANY, PETITIONER,

versus

AMERICAN OIL COMPANY, RESPONDENT

JURISDICTION

This Honorable Court should not entertain the petition herein for the following reasons:

(a) That the decision of the Circuit Court of Appeals is in conformity with other cases heretofore decided and is not in conflict with the opinions rendered by any other Federal Court where a similar question is involved.

(b) That the law, as announced by the Circuit Court of Appeals, in this case, is in conformity with that pronounced by this Court.

(c) That the decision of the Circuit Court of Appeals in the case at bar is in conformity with the law as announced by the highest Court of the State of South Carolina and by the Circuit Court of Appeals.

(d) That no new or important matter of law is involved, but what has been decided by the Circuit Court of Appeals is the established law of the land.

STATEMENT

This action is one for the recovery of damages, actual and punitive, for the alleged wrongful trespass upon real estate in which the petitioner, the plaintiff-respondent below, claimed a proprietary interest, and for the alleged wrongful conversion of certain equipment located thereon.

The respondent, the defendant-appellant below, denied the material allegations and alleged that it entered into possession under a valid written lease, in good faith, and that it had at all times offered to return to the petitioner the equipment or pay the reasonable value thereof. At the conclusion of all of the evidence the respondent moved the Court for a direction of verdict on the merits of the case and specifically moved for a direction of verdict as to punitive damages. These motions were overruled by the District Judge and a verdict was returned by the jury in favor of the petitioner for \$666.00 actual damages, and \$5,000.00 punitive damages. The question of the appropriation and use of the equipment by the respondent, independently of the question of a trespass upon the realty, was not raised or considered by the parties or by the Court on trial and, as stated in the opinion of the Court of Appeals (Record, 99), the entire theory of the case was whether or not the petitioner had an enforceable lease at the time of respondent's entry, and the question of whether or not there had been a conversion of the personalty was merely incidental to this issue. The Court of Appeals held that the evidence was susceptible of the inference that the petitioner was a tenant from year to year and that the appropriation by the respondent of petitioner's equipment was a violation of the latter's strict rights, notwithstanding respondent's offer to pay the value of the equipment in accordance with the local practice which was followed with respect to all petitioner's stations which were acquired by the respondent at or about

the same time. However, it ruled that the South Carolina authorities upon which the District Judge relied in overruling respondent's motion for a direction of verdict as to punitive damages do not justify the submission of the issue of punitive damages to the jury (Record, 98). It accordingly reversed the judgment of the District Court and remanded the case for a new trial unless petitioner shall file with the Clerk of the District Court a remittitur of the amount of the punitive damages separately included in the verdict of the jury. The petitioner now asks that this ruling be reversed.

POINTS AND AUTHORITIES

The petitioner predicates its right to have the judgment of the Court of Appeals reviewed by this Court upon two specifications of error, namely:

1. Because the judgment of the Court below was reversed in the absence of **error in law** on the part of the District Judge, and therefore such reversal constitutes a re-examination of facts tried by a jury, other than according to the rules of the common law, in violation of the Seventh Amendment and in conflict with the procedural requirements outlined by this Court.

2. Because the decision of the Circuit Court of Appeals is in violation of Act of Congress, XVIII Statutes, 318, 28 U. S. C. A., 879, providing that there shall be no reversal in a Circuit Court of Appeals for any **error in fact** and that such decision of the Court below was in conflict with the decision of this Court in *McCaughn v. Real Estate Land Title & Trust Co.*, 297 U. S., 606, 56 S. Ct., 604.

We respectfully submit that neither specification is well taken.

Specification No. 1

In taking this specification we respectfully submit that counsel for petitioner has misconceived the decision of the Court of Appeals and has misapprehended the applicable principles of law, practice, and procedure. On the trial of the case in the District Court respondent moved the Court to direct the verdict in its favor as to punitive damages on the ground that there is no evidence of willfulness, highhandedness or utter disregard of the rights of the plaintiff upon which they (the jury) could base punitive damages (R. 62). The District Judge ruled that there was some evidence of willfulness and overruled the motion (R. 62). This motion was renewed by the respondent in its motion to set aside the verdict of the jury and to direct the verdict in its favor on the ground that there was no evidence of willfulness, etc., (R. 66). This motion was likewise refused by the District Court (R. 66). In holding this ruling erroneous the Court of Appeals, after reciting a number of authorities from South Carolina and its own decisions, concluded:

"In the light of these authorities, we are satisfied that the evidence in the pending case did not justify the submission of the issue to the jury. A careful examination of the original record fails to disclose any substantial evidence that American (the respondent) or the district manager on its behalf, acted in willful, malicious or reckless disregard of the plaintiff's rights."

The petitioner contends that the District Judge, having found evidence of willfulness, both as to trespass upon the realty and as to conversion of the personalty, and the Court of Appeals having held that there was no evidence of willfulness as to trespass, it did not, specifically, reverse the District Judge in holding that there is evidence of willfulness as to the personalty and that therefore its de-

cision did not amount to a reversal of the District Court because of error in law.

As stated, the respondent's motion was directed to expel the issue of willfulness from the entire case. It is true that no separate motions were made as to trespass or conversion, but such was not necessary. There was only one primary wrong charged and the question for decision was whether the alleged delict in taking over the filling station and equipment by the respondent was characterized by willfulness.

As stated above, the Court of Appeals has held that the evidence did not justify the submission of the issue of willfulness to the jury. This holding necessarily implies that there was no substantial evidence of willfulness on the part of the respondent in connection with either trespass or the conversion.

Under the law as it obtains in South Carolina, punitive damages are not recoverable unless the alleged wrongful act was malicious or willfully done and in reckless disregard of the rights of others.¹

A rule which has been long recognized and applied by this Court, the Court of Appeals, and the Supreme Court of South Carolina, has been summarized as follows:

¹ "It is fundamental that punitive or vindictive damages can be awarded only in instances where there is something more than simple negligence or a technical conversion. There must be malice, ill will, a conscious indifference to the rights of others, or a reckless disregard thereof to justify an award of punitive damages. In the absence of such elements a person injured by the tortious conduct of another may recover compensatory damages for his injury, but no more." *Cox v. Coleman*, 189 S. C., 218, 200 S. E., 762 (1938).

And see: *Eaddy v. Greensboro-Fayetteville Bus Lines, Inc.*, 191 S. C., 538, 5 S. E. (2d), 281 (1939), where the Court held:

"In order to assess punitive damages it is necessary that there be present in the testimony some evidence of willfulness or of such gross disregard of the rights of others or such gross negligence that willfulness may be inferred."

And *Gwyn v. Telephone Co.*, 69 S. C., 434, 48 S. E., 460:

"Punitive damages are recoverable only when there is misconduct and malice, and a tort committed by mistake in the assertion of a supposed right, or without wrong intent, will not warrant exemplary damages."

"If only one reasonable or legitimate inference can be drawn from the evidence, the question is one of law for the Court."²

This rule was amplified in the case cited in the footnote.³

It therefore follows that if the Court of Appeals concluded that the evidence was susceptible of only one reasonable inference and such inference was that the respondent was not guilty of willfulness, it necessarily found that the District Court had committed an "error in law" in failing to withdraw the issue of punitive damages from the jury. Whether such acts of the respondent related to trespass or conversion is immaterial because the Court of Appeals has held that there was no willfulness at all, and consequently the issue of punitive damages was improperly submitted to the jury. Upon reaching such conclusion the disposition made of the case by the Court of Appeals followed a well-established pattern of the Supreme Court of South Carolina. It has been definitely held by the Court of that state that where in an action for both actual and punitive damages the trial Judge improperly submits the issue of punitive damages to the jury and the jury finds a verdict for both actual and punitive damages, the verdict for actual damages may be allowed to stand but the verdict for punitive damages should be set aside.⁴

² *Turner v. American Motorists Ins. Co.*, 180 S. E., 55; *Young v. Hyman Motors*, 19 S. E. (2d), 109; *State Highway Dept. v. Amick's Estate*, 18 S. E. (2d), 663; *Hartman v. Baltimore & Ohio R. Co.* (C. C. A., 4), 89 Fed. (2d), 425; *M. J. Carroll, Inc., v. Gilmore* (C. C. A., 4), 103 Fed. (2d), 560; *Gunning v. Cooley*, 281 U. S., 90, 50 S. Ct., 231, 74 L. Ed., 720; *Slocum v. New York Life*, 228 U. S., 364, 33 S. Ct., 523, 58 L. Ed., 879.

³ "If it be conceded that there may be deduced by a process of usual finesse of reasoning that there is a scintilla of evidence * * *, nevertheless there is another rule, more founded upon common sense and reason, to the effect that when only one reasonable inference, not just one inference, but one reasonable inference, can be deduced from the evidence, it becomes a question of law for the Court, and not a question of fact for the jury." *National Bank of Honea Path v. Thomas J. Barrett, Jr., & Co.*, 173 S. C., 1, 174 S. E., 581.

⁴ *Snellgrove v. Life Ins. Co. of Virginia*, 176 S. C., 175, 179 S. E., 793; *Welch v. Missouri State Life Ins. Co.*, 176 S. C., 494, 180 S. E., 447.

We therefore submit that the judgment of the District Court was in fact reversed for an **error in law** and that the reexamination of the facts was made according to common law and was not violative of the Seventh Amendment or within the rule relied upon by the petitioner.

The respondent's motion for direction of verdict as to punitive damages went to the whole case, trespass as well as conversion and the Court has held that the actions of the respondent were not such as to subject it to vindictive damages under the law as it obtains in South Carolina and elsewhere.

Specification No. 2

We submit that what has been said in answer to Specification No. 1 is a sufficient answer to this specification. As has been shown by the cited cases, where the evidence is so clear and conclusive that reasonable men could draw but one inference therefrom, it is the duty of the trial Judge to direct the verdict. The reversal of a trial Judge for failing so to do does not amount to a reversal for an error in fact within the meaning of the Act, XVIII Statutes, 318, 28 U. S. C. A., 879.

After a careful review of the evidence the Court of Appeals concluded that there was no substantial evidence of willfulness either in the trespass or in the alleged conversion, consequently punitive damages were not recoverable. The decision below is not at variance with the decision of this Court in *McCaughn v. Real Estate Land Title and Trust Company, supra*. That case held that the Court cannot pass upon the weight of the evidence and the question raised was whether the Court's verdict was wholly without evidence to sustain it. It concluded that such question did not appear to be substantial and that the general verdict was conclusive. Here the Court of Appeals has held that

the verdict for punitive damages is wholly without substantial evidence to sustain it, and therefore the Court did not weigh the evidence but on the contrary held that there was no evidence of willfulness.

Respectfully submitted,

PINCKNEY L. CAIN,
THOMAS, CAIN & BLACK,
J. K. EAGAN, JR.,
Attorneys for Respondent.

-
t
s